SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ROBIN FLOYD PANIS,

Petitioner,

v.

MISSION HILLS BANK, N.A., E. DUDLEY MCELVAIN, MARK R. LARRABEE, LEON G. RUPP, ALAN L. ATTERBURY, J. PHILIP COULSON, JULIE C. ESREY, FRED L. MERRIL, SR., ESTELLE G. SOSLAND, MORTON SOSLAND, NEIL SOSLAND, CHRISTOPHER Y. THOMAS, THOMAS J. TURNER, III,

Respondents.

Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Title Seven of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.) prohibit a bank employer from terminating a white female employee on the basis that her husband was charged with executing a scheme to defraud another bank?

2. Where an employer concludes that because of an employees' husbands alleged actions caused the employer to question the credibility of the employee, does the fear of the employer which is unsubstantiated constitute a good business reason for termination under the *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1972) analysis?

3. Is the question of discriminatory animus appropriate for resolution by summary judgement where the evidence of non-discrimination consists of the bank board's self-serving statements that a man and a woman would be treated the same if similarly situated?

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The Petitioner, Robin Floyd Panis, respectfully prays that a writ of Certiorari be issued to review the judgement of the United States Court of Appeal for the Tenth Circuit entered in the above entitled proceeding on July 31, 1995.

OPINIONS BELOW

The opinions and judgement of the Tenth Circuit Court of Appeals was entered on July 31, 1995 and is reported at 60 F.3rd 1486 (10th Cir. 1995). (App. 1a). The opinion and the judgement by the United States District Court for the District of Kansas was not reported. (App. 20a)

JURISDICTION

On July 31, 1995 the Tenth Circuit Court of Appeals entered a judgement and opinion affirming the United States District Court for the District of Kansas which granted summary judgement against the Petitioner. A Petition for Rehearing is currently pending before the United States Court of Appeals for the Tenth Circuit. Jurisdiction of the Court to review the judgement of the Tenth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. Sec. 2000e2

These provisions are reproduced, verbatim, in the Appendix commencing at p. 50a.

STATEMENT OF THE CASE

Robin Floyd was employed by the Mission Hills Bank in May of 1988 as an Executive Bank Representative. In March 1991 she was promoted to an Assistant Cashier at the Bank. During her tenure at the bank her employment evaluations were consistently superior and there was never any charge by any of her superiors that she was an inefficient or a dishonest employee. Petitioner married Salvador O. Panis in April of 1987 and began using his name. From 1975 through April 1990, Mr. Panis was manager of "Garden" branch of the United Missouri Bank (UMB) in downtown Kansas City, Missouri. On November 27, 1990 Mr. Panis was charged with seven counts of executing a scheme to defraud the UMB. The alleged acts of Mr. Panis where substantially committed prior to the Petitioner's marriage to Mr. Panis.

The Kansas City Star reported Mr. Panis had misappropriated funds from a UMB customer. In none of the articles printed by the Kansas City Star was the name of the petitioner mention. On November 28, 1990 the bank officers of the Mission Hills Bank and some of its directors read of Mr. Panis's indictment in the Kansas City Star. The morning the article was published, the bank officers and one director met to discuss the potential

impact of Mr. Panis's indictment on their employee, the Petitioner. They thought it might have an adverse effect on the bank's customers. The bank officers stated they felt the bank's customers would connect Robin Floyd Panis to Salvador O. Panis and the bank might have a resulting loss in customer confidence and business. The officer's advocated firing Panis that day, but the director proposed that Panis be placed on a leave of absence until the entire bank board could consider the whole matter.

Robin Floyd Panis was placed on a leave of absence which began on November 28, 1990. Prior to November 26, 1990, Panis had been promised a raise that was to be retroactive to November 1, 1990. On November 26, 1990 Panis's supervisor, Defendant Leon Rupp, authorized her pay raise on the expectation she would receive her performance appraisal before the increase was reflected in her paycheck.

A pay statement was issued to Panis showing the increased salary. One day later, on November 28, after the defendants learned of Mr. Panis's indictment and Mrs. Panis being placed on leave with full pay, Defendant Rupp, directed the payroll preparer to "back-out" the increase from funds from Panis's deposited paycheck.

The board members met on December 18, 1990 to consider the termination of Mrs. Panis's employment. There was testimony from board members as to whether they would view the issue in the same light if the roles had been reversed and it would have been a male employee. All board members were represented by the same legal counsel and gave essentially the same self-

serving answer that they would have treated a man in the same manner.

As stated to the EEOC it was the conclusion of the board of directors that, because of her husband's alleged actions, Ms. Panis' credibility with customers and Bank employees could be questioned concerning the safety of funds. After the decision to terminate was made the board of directors also decided to audit Mrs. Panis's accounts. No irregularities were found. Subsequently, Mrs. Panis filed a complaint with the Kansas Commission on Civil Rights. The Kansas Commission on Civil Rights administratively closed her file and then she requested a Right to Sue Letter. An action was timely brought in the United States District Court for the District of Kansas contending that the bank violated Title Seven of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2000e17.

It is Mrs. Panis's contention she was being unfairly terminated because the bank held the stereotypical view that her moral propensities were similar to those of her husband. She also contended that the bank's fear that there would be a loss of consumer confidence because she shared the same name as her husband was discriminatory because it is a prevalent custom in the United States for a woman to adopt her husband's name.

In addition, she also felt that the bank board's feeling in the loss of consumer confidence was totally without merit because there was no evidence that this had or would occur butfore the stereotypical belief that a woman is a mere reflection of her husband.

On April 5, 1994, the United States District Court for the District of Kansas granted summary judgement to the

Defendants. In essence, the court felt that Panis had presented no evidence of discrimination because there was no evidence that the bank had treated a similarly situated man differently and because the bank had stated that a man and a woman would be treated similarly in a similar situation. In addition, the court felt that the bank's concerns that individuals in the community would lose confidence was a legitimate reason for the purposes of the evidentiary analysis conducted under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1972).

A timely appeal was taken to the Court of Appeals for the Tenth Circuit. The Court of Appeals adopted a similar rationale in upholding the decision of the United States District Court. This petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

The facts of this case are shocking on their face. A woman, who had a successful banking career in her own right, was terminated from her employment and her banking career was ruined as a result of the actions of her husband. There was never any evidence Mrs. Panis knew of her husband's wrongdoing or that she in any way participated. An audit of her accounts with Mission Bank indicated that there were no irregularities. Until the time her husband was accused of bank fraud, Mrs. Panis had been promoted and was receiving raises at the Mission Bank.

The reason why a writ of certiorari should be granted in this case involves the broad policy implications of the circuit court's opinion. The essential thrust of the lower

court's decision is to return to the days of the 1800's as cited by Justice Brennan in *Frontiero v. Richardson*, 93 S.Ct. 1764, 1769-1770 (1973) where women were perceived as mere reflections of their husbands suffering the same glory and dishonor as the husband did.

The undisputed facts in this case, present a woman who on her own abilities would never have been terminated. It is because of the fact Mrs. Panis chose to use her husband's last name and the stereotypical view held by the bank that women are mere reflections of their husbands that the petitioner was terminated.

The lower court's opinion adopted the banks assertion that because the community held the stereotypical view a woman is a mere reflection of her husband and that a dishonest husband renders the wife dishonest justified the bank's decision to terminate should be seen for the canard that it is. Simply because a community has a stereotypical view of women should not justify an employer's use of that stereotype as a justification for termination.

This case presents an important question of federal law, which needs to be decided. Women should not be subject to the stereotypical view that they are reflections of their husbands. Women have their own character, their own careers and their own hard won abilities. Simply because one's husband has been charged with a crime does not mean the wife is a criminal nor should the wife be penalized by losing her employment. This policy needs to be clearly articulated so the marriage relationship is fostered rather than undermined that relationship.

Title Seven of the Civil Rights Act of 1964 was enacted to protect women from such discrimination, and because there have been no federal cases that clearly addressed the present factual scenario, this case presents an important question of federal law which should be settled by this court.

Using the lower court's rationale employers can thus discriminate at will against any protected class. A retail employer could terminate a black person on the basis that individuals in the community felt that all black people were dishonest without a shred of objective evidence to support the claim.

In view of these circumstances, the Petitioner feels the United States Court of Appeals for the Tenth Circuit as well the United States District Court for the District of Kansas have significantly departed from the accepted and usual course of judicial proceedings and their decisions should be reversed.

A second ground for reversal is that summary judgement is not an appropriate vehicle to dispose of cases that turn on the state of mind of employers when terminating employees. The bank board's self-serving statements that a man and a woman would be similarly situated as well as the articulation of a valid business reason for her termination both lend themselves to resolution by a trier of fact after the evidence is heard and the witnesses are cross-examined.

CONCLUSION

The Petitioner has stated a valid claim of discrimination under Title Seven of the Civil Rights Act of 1964, which should be fully adjudicated in the United States District Court for the District of Kansas, as a result this case should be remanded back to the District Court so that a trial can be conducted and evidence evaluated concerning the alleged "good business reason" for Mrs. Panis' termination and the animus of the board members in terminating her. The Petition for Certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBIN FLOYD PANIS, Plaintiff/Appellant,	)	
v.	)	No. 94-3132
MISSION HILLS BANK, N.A., et al.,	)	(Filed Jul. 31, 1995)
Defendants/Appellees.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 92-CV-2391)

Dan E. Turner (Phillip L. Turner with him on the brief), Topeka, Kansas, for Plaintiff/appellant.

Paul E. Donnelly, of Stinson, Mag & Fizzell, P.C. (David L. Heinemann and Scott C. Hecht with him on the brief), Kansas City, Missouri, for Defendants/Appellees.

Before MOORE and EBEL, Circuit Judges, and Cook*, Senior District Judge.

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* Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

COOK, Senior District Judge.

Robin Floyd Panis brought this action against Mission Hills Bank, N.A. (Bank) and its officers and directors, alleging that defendants discriminated against her on the basis of sex in violation of 42 U.S.C. §2000e *et seq.* Panis' complaint also alleged causes of action under Kansas law for conversion and breach of an implied-in-fact employment contract. The district court dismissed all of Panis' claims in granting defendants' motion for summary judgment. Panis now appeals from that grant of summary judgment and various procedural errors allegedly made by the district court. We affirm.

I. Background

Panis is a married white female residing in Kansas City, Missouri. Panis has been married to Salvadore O. Panis ("Sal Panis") since April, 1987. From 1975 through April, 1990, Sal Panis was the manager of the "Garden Bank" branch of United Missouri Bank (UMB) in downtown Kansas City, Missouri.

Panis was employed by defendant Bank in May, 1988 as an executive banking representative. In March, 1989, Panis was appointed assistant cashier at the Bank.

On November 27, 1990, Sal Panis was charged with seven separate counts of executing a scheme to defraud

UMB.[1] *The Kansas City Star* reported that Sal Panis had misappropriated between $77,000 and $100,000 from an elderly UMB customer. Sal Panis allegedly persuaded the UMB customer to invest in non-existent bonds and securities and to purchase cashier's checks made out to "Sinap" or "Sinap Enterprises" ("Sinap" is Panis spelled backwards). Neither the *Star* article nor the television news reports of Sal Panis' indictment mentioned Panis or her employment at the Bank.

On November 28, 1990, the Bank's officers and some of its directors learned of Sal Panis' indictment from the *Star* article or from the morning television news reports. The Bank officers and one director met that morning to discuss the potential impact that Sal Panis' indictment might have on the Bank's customers. The officers feared that the Bank customers would connect Panis to Sal Panis, and the Bank might thereby risk losing customer confidence and business. The officers advocated firing Panis that day, but the director proposed that Panis be placed on a leave of absence until the entire Bank Board of Directors could consider the matter. Panis' leave of absence began on November 28.

Prior to November 26, 1990, Panis had been promised a raise, which was to be retroactive to November 1, 1990. On November 26, 1990, Panis' supervisor, defendant Leon Rupp, authorized her pay raise on the expectation that Panis would receive her performance appraisal before the increase was reflected in her paycheck. The information

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[1] On February 5, 1991, Sal Panis pleaded guilty to federal bank fraud. On April 22, 1991, he was sentenced to 18 months in prison and ordered to pay UMB $60,027.00 in restitution.

to increase Panis' pay was electronically transferred to the Bank's payroll preparer on November 27, 1990. A pay statement was issued to Panis showing the increased salary. On November 28, 1990, after defendants learned of Sal Panis' indictment and placed Panis on full-pay leave, defendant Rupp directed the Bank's payroll preparer to "back out" the increased funds from Panis' deposited paycheck. Pursuant to Rupp's instructions, the payroll preparer used a three-way debit-credit form on November 30 to manually withdraw the increased amount from Panis' account, and then credited that account with the amount representing Panis' previous salary.

When the Board members met on December 18, 1990, they discussed whether Panis could be placed in a less responsible position at the Bank. Several directors expressed fear of the Bank's loss of customer confidence if Panis continued to work there. The small number of the Bank's staff also made it unlikely that another position could be offered to Panis.

One director raised the issue of whether the Board would view the termination issue in the same manner if the roles were reversed and a male officer's wife had been indicted. After discussion, all Board members were satisfied that the Board would have come to the same conclusion had the roles been reversed. The Board concluded that its best interest lay in terminating Panis' employment. One Board member suggested that Panis' accounts be audited. That audit found no irregularities in Panis' accounts.

The Bank's president called Panis on December 26, 1990, and offered her the opportunity to resign. Panis

declined to resign, and the Bank then terminated her employment.

On April 1, 1991, Panis filed a charge of sex discrimination with the Kansas Commission of Civil Rights (KCCR). Panis' charge of discrimination named "Mission Hills Bank and its representatives" as respondents, but did not identify by name or title any of the "representatives." After investigation, the KCCR advised Panis that her case was being "administratively closed" and placed in KCCR's "inactive files." Panis then requested a right-to-sue letter.

II. Discussion

A. Summary Judgment Standard of Review

We review *de novo* the district court's grant of summary judgment and apply the same standard used by the district court. *Applied Genetics Int'l. Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We view the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Deepwater Invs. Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991).

Under Rule 56(c), the moving party has the initial responsibility to show that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets this requirement, the burden shifts to the nonmoving party to make a showing sufficient to establish that there is a genuine issue of material fact regarding "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The nonmoving party may not rest upon "the mere allegations or denials of [her] pleading. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must go beyond the pleadings and establish, through admissible evidence, that there is a genuine issue of material fact that must be resolved by the trier of fact. *Celotex*, 477 U.S. at 324. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

B. Sex Discrimination Claim

In granting summary judgment for the defendants, the district court found that Panis had not presented any evidence that defendants' termination of her employment was motivated by her gender. The district court also found that, under the burden allocation scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), defendants had articulated a legitimate, nondiscriminatory reason for discharging Panis when they stated that "[i]t was the conclusion of the Board of Directors that, because of her husband's actions, Ms. Panis'

credibility with customers and Bank employees could hereafter be questioned concerning the safety of funds." The district court further found that Panis had not shown that defendants' reason for discharging her was a pretext for discrimination. The district court concluded that Panis' discharge because of the publicity surrounding her husband's illegal activities did not support a finding that she was discharged on the basis of her sex.

On appeal, Panis criticizes the district court's finding that defendants produced a legitimate, nondiscriminatory reason for discharging her. Because defendants did not conduct an investigation of either Panis or the impact, if any, of the indictment publicity upon the Bank's customers, Panis argues that defendants failed to justify, with objective evidence, their assumption that Panis' own credibility should be questioned. Without such justification, Panis suggests defendants' reasons were pretext and that it is more likely that defendants relied on a sexual stereotype that a woman's character traits reflect those of her husband. According to Panis, the district court erred in not recognizing the presence of that stereotype when finding defendants' discharge of Panis did not constitute sex discrimination.

Panis misunderstands the nature of defendants' burden in the three part burden shifting format set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Once the plaintiff has established a prima facie case, the burden of *production* shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the employee's discharge. *Id.* at 802; *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2747 (1993). To carry its burden of production, a defendant need only:

> articulate through some proof a facially non-discriminatory reason for the termination; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied on was bona fide. . . .

E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312, 1316 (10th Cir. 1992).

Here, defendants consistently stated that Panis was discharged because the Bank's Board of Directors and officers feared a loss of customer confidence if Panis were somehow linked with her husband's indicted actions. Contrary to Panis' arguments, defendants are not required to provide evidence to justify their articulated reason or to persuade the Court that their reason was correct. Rather, once defendants articulated their reason for Panis' discharge, Panis then had the burden to persuade the district court that defendants' reason was unworthy of belief and a pretext to cover up discriminatory motives. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 (10th Cir. 1994); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1160 (10th Cir. 1991). The district court found that Panis did not tender any fact to support her assertion of pretext. Our review of the record supports the district court's conclusions as to the lack of facts suggesting pretext.

Our review of the record likewise finds that Panis failed to create a genuine issue of fact with her argument that defendants relied on a sexual stereotype that Panis was a mere reflection of her husband and would mirror his indicted conduct. Panis offered no specific facts to

demonstrate that defendants acted pursuant to that stereotype. Instead, Panis only speculated that defendants "must have" held such a stereotypical belief when they terminated her employment. In *Branson v. Price River Coal Co.*, 853 F.2d 768 (10th Cir. 1988), we stated that a plaintiff's "mere conjecture that [her] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." *Id.* at 772. That statement applies here as well.

Panis also argues that the district court erred in finding that defendants would have fired a male employee in circumstances similar to Panis'. Panis attempts to place defendant Leon Rupp, the Bank's cashier and her former supervisor, in a position similar to that of her husband, by arguing that Rupp embezzled funds from her account when he authorized the "back-out" of her pay raise after Panis was placed on leave of absence. Panis contends that the Bank neither fired nor reprimanded Rupp for the withdrawal of funds from her account, thereby generating an example of disparate treatment by defendants based on gender.

Initially, we give no credence to Panis' argument that Rupp "embezzled" funds from her account. Under Kansas law, "embezzlement" requires that the person entrusted with the funds appropriate them for his own use. *See State v. Stryker*, 118 Kan. 620, 236 P. 849, 851 (1925); *Bolton v. Souter*, 19 Kan. App.2d 384, 872 P.2d 758, 761 (1993). Panis has not shown that Rupp "backed-out" her pay raise from her account with the intent of using those funds for himself. In contrast, Sal Panis' misappropriation of funds from the UMB customer for his own use is a clear example of embezzlement. Additionally,

Panis' attempt to set up a disparate treatment example using Rupp fails because she has not shown that Rupp was similarly situated to her. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 532 (10th Cir. 1994) (to make a comparison demonstrating discrimination, plaintiff must show employees were similarly situated). It is undisputed that Panis was not discharged for criminal actions on her part, and that her husband did not work for the Bank, thus flawing her attempted comparison with Rupp. No evidence was presented that Rupp or any other Bank employee's family was linked to unfavorable publicity that could cause the Bank to fear the loss of its customers' confidence and business. Panis thus has not carried her burden of proof on her disparate treatment argument. *See E.E.O.C. v. Flasher*, 986 F.2d at 1320 (plaintiff must prove why differential treatment occurred and that it was caused by intentional discrimination against a protected class).

C. Conversion Claim

With its dismissal of Panis' discrimination claim under Title VII, the district court declined to exercise jurisdiction over the pendent state-law claims in Panis' complaint, including the cause of action for conversion under Kansas law. Even if it did exercise pendent, or what is now termed supplemental, jurisdiction over the conversion claim, the district court concluded that that claim failed as a matter of law. The district court found that, under Kansas law, a depositor may not sue a bank for conversion of funds from a checking account, relying on *Temmen v. Kent-Brown Chevrolet Co.*, 227 Kan. 45, 605 P.2d 95, 99 (1980). The district court also found that Panis

did not have actual possession of the disputed funds or the right to immediately take possession of those funds, and thus could not claim a conversion of the disputed funds, citing *Gillespie v. Seymour*, 14 Kan. App. 2d 563, 796 P.2d 1060, 1066 (1990).

Panis bases her claim of conversion upon the fact that the signature card on her account authorizes only Panis as the sole person to withdraw funds from that account. Panis alleges that defendant Rupp knew that fact, and without her authorization Rupp withdrew the pay raise promised Panis from her account. Panis claims that the district court erred in relying on the two Kansas decisions to find that she had no cause of action for conversion against the Bank.

Pursuant to 28 U.S.C. § 1367(c) (3), a district court has discretion to decline to exercise supplemental jurisdiction once it has dismissed the claims over which it had original jurisdiction. We find the district court did not abuse that discretion in dismissing Panis' conversion claim. Additionally, we agree with the district court's assessment that Panis' conversion claim failed as a matter of law. Despite her criticism of the district court's reliance upon the above-cited Kansas decisions, Panis failed to cite a Kansas decision which either supported her conversion argument or refuted the decisions relied upon by the district court.

D. Breach of Implied-in-Fact Contract Claim

Under the employment-at-will doctrine in Kansas, employment is terminable at the will of either the

employer or the employee for good cause or no cause at all. *See Johnson v. National Beef Packing Co.*, 220 Kan. 52, 54, 551 P.2d 779, 781 (1976). The Kansas courts have developed an exception to the employment-at-will doctrine, stating that an employer may not treat an employee as one at will when there has been an implied agreement to the contrary. *Morriss v. Coleman Co.*, 241 Kan. 501, 509, 738 P.2d 841, 848 (1987).

Whether an implied-in-fact contract exists is a question of fact. *Id.* A mutual intent to form a contract is necessary to show that an implied-in-fact contract exists. *Atchison County Farmers Union Co-op Ass'n v. Turnbull*, 241 Kan. 357, 363, 736 P.2d 917, 922 (1987). A unilateral expectation on the part of the employee does not create an implied-in-fact contract for continued employment. *Harris v. Board of Public Utilities of Kansas City*, 757 F.Supp. 1185, 1190 (D.Kan. 1993). A reasonable person must be able to find from all relevant circumstances of the plaintiff's employment that there was an intent on both sides to be bound. *Berry v. General Motors Corp.*, 838 F.Supp. 1479, 1492 (D.Kan. 1993).

To determine the parties' intent when considering whether an implied-in-fact contract existed, the Kansas Supreme Court has endorsed the following language

> Where it is alleged that an employment contract is one to be based upon the theory of "implied in fact," the understanding and intent of the parties is to be ascertained from several factors which include written or oral negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the

> parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.

Morriss, 241 Kan. at 510, 738 P.2d at 847 (quoting *Allegri v. Providence-St. Margaret Health Center*, 9 Kan. App.2d 659, 684 P.2d 1031, 1031 (1984)).

Panis claims that she had an implied-in-fact contract with the Bank that her employment there would not be terminated except for cause and that the Bank breached that contract when it terminated her employment without cause. Panis first asserts that the Bank told her that she would not be discharged but for cause. Panis has not pointed to any specific written or oral communication from the Bank or any of its officers or directors to support this assertion.

Panis also bases her claim of an implied-in-fact contract upon her participation in another Bank employee's discharge. During her employment with the Bank, Panis was asked to document another employee's shortcomings; that employee was later discharged. From this incident, Panis argues that the Bank evidenced its agreement that Bank employees would not be discharged without cause. Panis again has not pointed to any specific action or communication directed from the Bank to her, that indicated the Bank's intention to enter into an implied-in-fact contract with Panis. From our review of the record, we find that at most, Panis had only a unilateral expectation of continued employment with the Bank. As noted above, that expectation is insufficient to create an

implied-in-fact contract. We find that Panis has not set forth facts to raise the issue that such a contract existed between the Bank and her.

Panis also alleges that defendants entered into an implied-in-fact contract with her, when defendant McElvain promised to conduct an investigation of the indictment publicity's impact upon the Bank's customers. According to Panis, defendant McElvain promised to "get in touch" or "get back with" Panis after conducting the investigation. Defendants do not dispute that they never made such an investigation before determining to discharge Panis.

Even accepting, as we must, Panis' version of defendant McElvain's promise to conduct an investigation, we fail to discern what, if any, rights or benefits Panis gained from that promise. As admitted by Panis, McElvain only promised to contact Panis after the investigation was concluded. McElvain did not convey to Panis that her employment was contingent upon the results of the investigation. Since McElvain did "get in touch" with Panis later when he asked for her resignation, defendants' failure to conduct an investigation did not breach any promise made to Panis. Panis may have held the unilateral expectation that the Bank would call her back to work after making its investigation, but once again, Panis' unilateral expectation of what the Bank would do is an insufficient basis for an implied-in-fact contract.

E. Alleged Procedural Errors

Panis also appeals from procedural errors the district court allegedly committed. We briefly consider these alleged procedural errors seriatim.

1. Dismissal of individual defendants

The district court determined that it did not have subject matter jurisdiction over the individual defendants because Panis failed to specifically name those defendants when she filed her charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and the KCCR. Panis argues on appeal that her designation of the Bank and its "representatives" as respondents was sufficient to put the individual defendants on notice so as to be able to respond to her charge of discrimination.

In view of our finding that the district court did not err in granting defendants summary judgment on all of Panis' causes of action, we believe that the dismissal of the individual defendants did not affect any substantial rights that Panis may then have had in this action. Accordingly, we consider any error allegedly committed by the district court in dismissing the individual defendants to be harmless pursuant to 28 U.S.C. § 2111 (1988).

2. Defendants' Answers Filed Out-of-Time

Panis criticizes the district court's permitting the individual defendants to file their answers out-of-time. The Bank filed its answer four days after venue of the

action was transferred to the district court from the Western District of Missouri. The Bank's answer failed to include the twelve individual defendants' names in its caption. When defendants' counsel discovered that omission approximately one month later, he promptly sought leave to file answers for all the individual defendants out-of-time. The district court granted such leave. When defendants' counsel eventually filed the out-of-time answer, defendant Leon Rupp's name was inadvertently left off the caption again. The omission of Rupp's name was not discovered until later in the action, although discovery on behalf of Rupp was conducted by defendants' counsel.

Panis objected to the out-of-time filing of defendants' answers. Panis sought default judgment against defendant Rupp for failure to answer, even though Rupp had responded, through defendants' counsel, to Panis' discovery requests. On appeal, Panis argues that the district abused its discretion in permitting the defendants to file their answers out-of-time and in denying Panis' motion for default judgment against Rupp.

Under Fed.R.Civ.P. 6(b), the district court had discretion to permit the late filing of defendants' answer if defendants could show that the delay was caused by "excusable neglect." In *Pioneer Inv. Services v. Brunswick Associates*, ___ U.S. ___, 113 S.Ct. 1489 (1993), the Supreme Court considered "excusable neglect" in a context similar to this action. In Pioneer, creditors sought to file a proof of claim when the deadline set by the bankruptcy court had passed for such filings. The creditors claimed their late filing was due to "excusable neglect." *Id.* at ___, 113 S.Ct. at 1492-93. In construing the bankruptcy counterpart

to Fed.R.Civ.P. 6(b)(2), the Supreme Court noted that "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at ___, 113 S.Ct. at 1495.

We find the district court did not abuse its discretion in permitting defendants to file their answers out-of-time and in denying Panis' motion for default judgment against defendant Rupp. The record demonstrates that defendants' late filings were due to mistake, inadvertence or carelessness and not to bad faith on defendants' part.

3. Denial of Leave to Amend Complaint.

Panis next complains that the district court denied her leave to file an amended complaint. The district court found that Panis sought to file her amended complaint six months after the deadline for such filings had passed. The district court also found that the causes of action to be added by the amendment were based on facts available to Panis at the time she filed her original complaint. Panis asserts that the district court acted unfairly in allowing defendants to file their answers out-of-time, while strictly enforcing a deadline against Panis.

"The decision to grant leave to amend a complaint, after the permissive period, is within the trial court's discretion, Fed.R.Civ.P. 15(a), and will not be disturbed absent an abuse of that discretion." *Woolsey v. Marion Labs, Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991). Untimeliness in itself can be a sufficient reason to deny leave to

amend, particularly when the movant provides no adequate explanation for the delay. *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir. 1994). "Where the party seeking the amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial." *State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 416 (10th Cir. 1984).

Panis' perceived unfairness in the district court's treatment of the parties' out-of-time filings does not convince us that the district court abused its discretion in this regard. We note first that the time in requesting leave to file justifies the difference in the district court's treatment of these filings. Defendants requested leave to file out-of-time soon after their omitted answers were discovered and before significant discovery had commenced. Panis, on the other hand, waited more than six months after the deadline to amend had passed, when most of the discovery had been completed and the case was ready for determination. Secondly, the prejudice factor in allowing these two filings was different in its impact upon the opposing party. Defendants' out-of-time answers were virtually identical and did not raise new issues. In contrast, Panis' amended complaint sought to add new causes of action which would have required that discovery be reopened. Finally, defendants admitted that their reason for filing out-of-time were based on inadvertence or carelessness. Panis provided no explanation why she did not seek to amend her complaint before the deadline, when the amendments were not based on new evidence, but on knowledge she held at the time when she first

filed this action. These differences provide us with ample grounds to approve the district court's actions.

III. Conclusion

For the foregoing reasons, the district court's judgment is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBIN FLOYD PANIS, Plaintiff, v. MISSION HILLS BANK, N.A., et al., Defendants.	)	CIVIL ACTION No. 92-2391-EEO

MEMORANDUM AND ORDER

This case comes before the court on the following motions:

> Joint Motion of all Defendants for Summary Judgment (Doc. #242); and
>
> Plaintiff's Motion for Partial Summary Judgment (Doc. #233).

Both motions have been responded to by the opposing party. For the reasons stated below, Defendants' Motion for Summary Judgment (Doc. #242) is granted. Plaintiff's Motion for Partial Summary Judgment (Doc. #233) is denied.

I. FACTUAL BACKGROUND

A. Parties

The material uncontroverted facts established by the parties in accordance with District of Kansas Rule 206(c) are as follows:

Plaintiff Robin Floyd Panis is a married white female, presently residing in Kansas City, Missouri. Plaintiff is married to Salvadore O. Panis ("Sal Panis"). She has been married to Sal Panis since April 7, 1987. From at least 1975 through April 1990, Sal Panis was the manager of the "Garden Bank" branch of United Missouri Bank ("UMB") in downtown Kansas City, Missouri.

Defendant Mission Hills Bank, N.A. ("Mission Hills Bank" or "the Bank") was a national bank chartered by the federal government through the Office of Comptroller of the Currency. It continued to operate as a national bank until October 30, 1992, when its parent company was acquired by Fourth Financial Corporation and the Mission Hills Bank was merged into Bank IV, Kansas, N.A., a subsidiary of Fourth Financial Corporation. Mission Hills Bank is located in Mission Woods, Kansas.

Mission Hills Bank was started with the idea of providing a unique style of service to its customers and depositors. A hallmark of Mission Hills Bank's unique style was the lobby service it provided through experienced customer representatives called executive banking representatives.The executive banking representatives were located in the lobby and had the authority to conduct most of the depository services in Mission Hills Bank, including opening accounts, cashing checks, providing safe deposit service, handling discount broker transactions, and, in certain instances, making consumer loans.

Plaintiff was employed by Mission Hills Bank as an executive banking representative from May 1988 through December of 1990. During plaintiff's employment with

Mission Hills Bank, defendant E. Dudley McElvain was president of the Bank, and defendant Mark R. Larrabee was executive vice president of the Bank. Defendant Leon G. Rupp became vice president and cashier of the Bank in 1988. Rupp was plaintiff's supervisor from the time Rupp joined the Bank in 1988.

Defendants Alan J. Atterbury, J. Philip Coulson, Julie C. Esrey, E. Dudley McElvain, Fred L. Merrill, Sr., Estelle G. Sosland, Neil Sosland, Christopher Y. Thomas and Thomas J. Turner, III, were members of the board of directors of Mission Hills Bank while plaintiff was employed by the Bank.

B. Plaintiff's Employment with Mission Hills Bank

On March 29, 1988, plaintiff wrote Mission Hills Bank to apply for employment as an executive banking representative. She enclosed a copy of her resume with her letter. Lynne Anderson of Mission Hills Bank called plaintiff and asked her to come to the Bank for an interview. Plaintiff first interviewed with Anderson and Marki Cady. She later returned to the Bank and interviewed with two executive banking representatives. Plaintiff told Anderson and Cady that she was married, and also indicated on her resume that she was married.

Plaintiff received an offer of employment and started work as an executive banking representative at the Bank on May 2, 1988. Plaintiff's primary duties as an executive banking representative were memorialized in a written job description. That document reflects plaintiff's primary responsibilities as an executive banking representative at the Bank.

Plaintiff's customer service duties in the Bank's lobby included opening new depository accounts and servicing existing depository accounts; taking and placing orders for discount brokerage transactions; opening and accepting deposits for Individual Retirement Accounts (IRA's) and Simplified Employee Pension plans (SEP's); taking information from customers for consumer loans and preparing the paperwork so the loans could be approved by a loan officer; taking deposits from merchants which accepted Visa and MasterCard payments and then depositing those payments in the Bank for credit and collection; and opening safe deposit accounts for customers, allowing them access to their safe deposit boxes, and collecting rents for those boxes. Executive banking representatives such as plaintiff also had administrative duties, were responsible for performing teller transactions, and were expected to attend seminars and classes for continued professional development.

On October 12, 1988, Panis completed a "Performance Review Pre-Appraisal Form" as a part of the Bank's performance evaluation process for it employees. On this form, plaintiff listed her goals and objectives for the coming period. One of the goals she listed was "[t]o represent Mission Hills Bank with pride as an officer in the company."

Approximately five months later, on March 21, 1989, the Bank's board of directors appointed plaintiff to the officer position of assistant cashier, and gave her the following signing authorities: she was authorized to sign cashier's checks up to $50,000; she was authorized to co-sign certificates of deposit; and she was authorized to sign certificate of deposit interest checks up to $5,000.

When Panis was appointed as an officer, she was expected to do more than she had as an executive banking representative. She was expected to take more of a leadership role in the Bank and to identify and correct problems in the Bank. Accordingly, after plaintiff was appointed as an officer, she "assumed responsibility for the drive-thru teller staff of two and assisted [the] Cashier with preparation of monthly board reports while continuing in customer service." After taking a compliance examination, plaintiff "became the deposit-side compliance officer, drafted compliance policies and completed subsequent training and reporting."

Additionally, while plaintiff was employed by Mission Hills Bank she "[s]upervised the daily investment of over $2.5 million in repurchase agreements and [was] responsible for the bank's debit card system."

On April 17, 1990, plaintiff was reappointed as an assistant cashier of Mission Hills Bank by the Bank's board of directors, and she was given the following signing authorities: to co-sign (with any other assistant cashier) cashier's checks up to $50,000; to sign cashier's checks up to $25,000 by herself; to co-sign (with another assistant cashier) interest checks up to $50,000; to sign interest checks up to $10,000 by herself; and to issue certificates of deposit in amounts greater than $10,000.

C. Events Leading to the Termination of Plaintiff's Employment

On the evening of April 30, 1990, plaintiff's husband, Sal Panis, informed plaintiff that he had been terminated from his position as vice president and branch manager

of the "Garden Bank" facility of UMB and that he was being investigated by UMB for problems relating to the account of a specific customer, Ms. Alwine Mullenhoff. In late August or early September 1990, plaintiff learned that the United States Attorney's office was investigating her husband. In October of 1990, Panis learned from her husband that a federal grand jury would be indicting him, although she did not know when that indictment would be handed down.

Although she revealed in general terms to two co-employees that her husband had lost his job and was under an internal investigation at UMB, she did not inform anyone at the bank that a federal grand jury had been looking into her husband's situation or that an indictment was imminent.

On November 27, 1990, at approximately 3:00 p.m., Sal Panis was charged with seven separate counts of executing a scheme to defraud United Missouri Bank in violation of Title 18, U.S.C. § 1344, *et seq.*

On November 28, 1990, the front page of *The Kansas City Star* carried an article entitled "Nest Egg Vanishes In Banker's Care" and subtitled "Manager Indicted on 7 Counts of Fraud." The article reported that Sal Panis had misappropriated between $77,000 and $100,000 from an 84-year-old UMB customer, identified in the article as Alwine Mullenhoff, by persuading her to invest in non-existent bonds and securities. The article reported that Mr. Panis also induced Mullenhoff to purchase cashier's checks made out to "SINAP" or "SINAP Enterprises," and it noted that "SINAP spelled backward is Panis." Mullenhoff was quoted in the article as saying she had

been waited on by the "always polite bank manager, Sal O. Panis, Jr.," who had also become, in 1985, her "private investment advisor." The article also attributed the following quote to Mullenhoff:

> I did all my business with him . . . He was awfully nice to everyone. I can't understand why he did me like that. He got everything I had in the bank. . . . I wonder what he did with all that money.

On the morning of November 28, 1990, McElvain first heard of Sal Panis's indictment when it was reported on a morning television news show. He later read the account of the indictment in the *Kansas City Star* article. Also that morning, Larrabee read the *Kansas City Star* article concerning Sal Panis.

That same morning, a meeting was convened at Mission Hills Bank in the office of McElvain. In attendance at the meeting were the defendant officers of the Bank: McElvain, Larrabee and Rupp, as well as a defendant Board member, Dr. Christopher Thomas, who happened to be present at the Bank that morning on an unrelated matter.

The four participants at the meeting discussed the newspaper article and the potential impact it might have on the Bank's customer base. While expressing concern for plaintiff, they also expressed concern that customers might read the article and make a connection between Sal Panis and plaintiff, and the Mission Hills Bank might be placed at risk with respect to losing customer confidence, losing customers, and losing ongoing business. Larrabee and McElvain were sufficiently troubled by the article

that they believed it was in the Bank's best interest to terminate plaintiff's employment that morning.

At the meeting, Thomas proposed that, as an alternative to immediate termination, plaintiff be placed on a leave of absence so that the matter could be brought to the Board of Director's attention. Rupp joined in this recommendation.

Immediately after the meeting, Rupp went to the lobby of the Bank, greeted Panis and asked if she could meet with McElvain, Larrabee and himself in McElvain's office. At this meeting, the Bank's management placed plaintiff on a leave of absence, effective immediately and with full pay. McElvain reported the substance of what had occurred that morning to the Chairman of the Board, defendant Fred Merrill, who indicated his approval of the action taken.

During the days that ensued, McElvain and Larrabee had several informal discussions relating to the possibility of placing Panis in alternative positions within the Bank where she would not be in direct contact with customers. McElvain did not feel comfortable with any alternatives. Larrabee observed that there were no open positions in the Bank at that time. McElvain and Larrabee concluded that it would be in the best interests of the Bank to sever its relationship with Panis.

D. The December 18, 1990 Meeting of the Board of Directors of Mission Hills Bank

On December 18, 1990, the Board of Directors of Mission Hills Bank held its regularly-scheduled monthly

meeting. In attendance at the meeting were defendant officers McElvain and Larrabee; defendant directors Atterbury, Coulson, Esrey, Merrill, Thomas, Estelle Sosland, Neil Sosland, and Turner; the Bank's counsel, Howard Mick, of the law firm of Stinson, Mag & Fizzell; and Morton Sosland, a shareholder and the spouse of Estelle Sosland.

McElvain advised the Board of the events which had occurred on the morning of November 28, 1990. He described the fact that an article had appeared on the front page of *The Kansas City Star* reporting charges of bank fraud against plaintiff's husband. He informed the Board that the Bank's management had placed plaintiff on a fully paid leave of absence. McElvain also advised the Board that he was concerned about the risk of losing customer confidence because of the publicity involving plaintiff's spouse and the specific nature of that publicity, to-wit, bank fraud of an elderly bank customer.

A general discussion among the members of the Board followed McElvain's remarks. Several Board members immediately expressed their opinion that the Bank would risk a potential loss of customer confidence if plaintiff remained employed there. Various Board members also expressed concern and empathy for plaintiff's personal situation as a result of her spouse's indictment, but they weighed that concern against their duty to act in what they saw as the best interests of the Bank under the circumstances. Turner initiated a discussion of whether plaintiff could be placed in a position within the Bank sufficiently removed from her then-present duties so that she could remain employed. All present felt the Bank was too small to accomplish that objective.

Esrey expressly raised the issue whether the Board would be viewing the termination issue in the same manner if the roles were reversed and a male officer's wife had been indicted. After the discussion of this issue, both Esrey and the Board were completely satisfied that the Board would have come to the identical conclusion had the roles been reversed.

Following a full discussion of the matter, the Board unanimously concluded that it would be in the best interest of the Bank to sever its employment relationship with plaintiff. The Board authorized McElvain to first seek plaintiff's resignation and, failing to obtain that, to terminate her employment. After the termination decision had been made, one member of the Board suggested that an audit be performed on plaintiff's accounts during the time that the auditors would be performing their regular audit.

E. Events Following the Board's Decision

Plaintiff never returned to work at the Bank after November 28, 1990. Rhonda Doyle, a married woman, assumed the plaintiff's Executive Banking Representative duties.

On December 26, 1990, McElvain telephoned plaintiff and informed her of the Board's decision regarding her employment status. He then stated that the bank had decided that her employment was no longer going to be possible and that if she would execute the Bank's release form, that the Bank would pay her a stated amount of money if she resigned. If she decided not to resign, then

she would be terminated. Plaintiff declined the offer, and her employment was terminated. She was paid through December 31, 1990.

On January 28, 1991, plaintiff became employed as a full-time field secretary with Turner Construction Company in Kansas City, Missouri.

On February 5, 1991, Sal Panis pleaded guilty to federal bank fraud. On April 22, 1991, he was sentenced to 18 months in prison and ordered to pay UMB $60,027.00 restitution.

F. Plaintiff's Sex Discrimination Claim

On or about April 1, 1991, plaintiff filed a charge of sex discrimination with the Kansas Commission on Civil Rights (KCCR), now the Kansas Commission on Human rights (KCHR). Although plaintiff's charge of discrimination named "Mission Hills Bank and its representatives" as respondents, none of the "representatives" of Mission Hills Bank was identified by name or title in the charge.

In her charge of discrimination filed with the KCCR, plaintiff alleged the following:

I. I am a female.

A. I was hired by the Respondent in May 1988, and worked as an assistant cashier.

B. On or about December 26, 1990, I was given the option to resign with a lump sum payment or be terminated with no severance pay. This action was based upon the fact that an article which adversely involved my husband had appeared in the newspaper in

> November 1990. Since I am a married female I carry my husband's surname, and although the article made no reference to either me nor [sic] the Respondent I was placed on leave of absence, with pay, until it could be determined there would be no repercussions on the respondent, and then was given the two options.
>
> II. I feel this act on the part of the respondent and its representatives is due to my sex.

In her deposition, plaintiff affirmed that the above statement continues to be the basis of her claim for sex discrimination in this case.

As a part of its inquiry into plaintiff's charge of discrimination, the KCCR submitted a request for materials and information to the Bank on April 1, 1991, in which, among other things, it asked the Bank to identify why the plaintiff was "ultimately terminated." The Bank responded to that request by articulating the following reason for plaintiff's termination:

> It was the conclusion of the Board of Directors that, because of her husband's actions, Ms. Panis' credibility with customers and Bank employees could hereafter be questioned concerning the safety of funds. It was felt, therefore, that she could no longer effectively perform her duties as an officer and Executive Banking Representative in keeping the public's interest and confidence and that her continued employment could undermine the stability of the Bank's customer base.

In their depositions in this action, Thomas and Larrabee affirmed that this statement accurately stated the reason for plaintiff's termination.

On January 14, 1992, the KCCR wrote plaintiff and informed her that her administrative case arising from her charge of discrimination was being "administratively closed" and placed in the KCCR's "inactive files." Upon receipt of this notice from the KCCR, plaintiff requested a right to sue letter.

G. Plaintiff's Conversion Claim

When plaintiff became an employee of Mission Hills Bank in May 1988, she opened a "demand deposit account," that is, a checking account, with the Bank. Plaintiff's demand deposit account with the Bank was a normal checking account. Plaintiff did not, and in fact could not, keep any specifically identifiable property such as stocks or securities in this demand deposit account. Plaintiff's salary from the Bank was deposited directly into the account.

Following the completion of an initial six-month period of employment, employees of the Bank received formal written performance evaluations on an annual basis and were eligible to be considered for salary increases in conjunction with their annual performance evaluations. In order for a Bank employee to receive an approved salary increase, it was customary that the employee's supervisor first had to prepare a written evaluation of the employee's performance and then present that written evaluation to the employee in a face-to-face meeting.

Under this procedure, plaintiff and another executive banking representative, Peggy Melton, were due to receive their annual performance evaluations from their supervisor, defendant Rupp, and were eligible to be considered for pay increases on November 1, 1990. However, Rupp was late in preparing the performance reviews of plaintiff and Melton.

On November 26, 1990, in anticipation of completing plaintiff's performance evaluation by the end of the month, Rupp telephoned Lynne Anderson, who was at that time a part-time employee of the Bank responsible for preparing and telephoning payroll entries to the Bank's outside payroll vendor, ADP. Rupp told Anderson to do "the preliminary work" necessary to institute a pay increase for both plaintiff and Melton. Anderson computed an increase in plaintiff's salary on work sheet papers and then she called in the increases to ADP.

On November 28, 1990, plaintiff was placed on a leave of absence from her employment at the Bank. Rupp, in his deposition, testified that because plaintiff was placed on leave, she did not receive her performance review from him in November 1990; therefore, she was not eligible to receive a pay increase.

On November 28 or 29, 1990, Rupp called Anderson and reported that plaintiff was on a leave of absence, that it would not be possible for him to conduct the face-to-face meeting with plaintiff regarding her performance evaluation, and that Anderson needed to "back out" the merit increase from ADP's system that he had authorized on November 26, 1990.

Anderson told Rupp it was too late to reverse the transaction scheduled to occur on November 30, 1990, with ADP. Anderson could only correct the situation by making entries to the Bank's payroll records with resulting changes being effective November 30, 1990.

On either November 29 or 30, Anderson prepared and processed a three-way debit/credit form which first reversed the ADP electronic transfer scheduled to occur at midnight on November 30, 1990, (the pay increase) and then put the corrected (or pre-raise) amount into the account. No "checks" were deposited in plaintiff's account by either ADP or the Bank; the transaction was entirely paperless.

H. Plaintiff's Implied-In-Fact Contract Claim

A committee of Mission Hills Bank employees prepared an employee handbook entitled, "Mission Hills Bank, N.A. Associate Handbook." The policies collected for inclusion in the Handbook were already in effect and practice at the Bank. Plaintiff was a member of the committee that assisted in the preparation of the handbook.

On its cover page, the Associate Handbook stated:

"EMPLOYMENT WITH THE BANK IS FOR NO DEFINITE TERM AND MAY BE TERMINATED AT ANY TIME, WITH OR WITHOUT NOTICE, FOR ANY REASON." In the "RESIGNATIONS AND TERMINATIONS" section, the Associate Handbook provided:

> There is no contractual arrangement between the Associate and Bank regarding employment. All employment is considered "at will and can

be terminated at any time by either party without cause."

In her deposition, plaintiff testified that she bases her implied-in-fact contract claim only on the "general understanding that had always prevailed in the bank that no one was ever terminated without cause, and that was witnessed with several people leaving the bank while I was employed there." Plaintiff does not base her implied-in-fact contract claim on the Associate Handbook or any other document of Mission Hills Bank. No one ever promised plaintiff a job for the duration of her adult life at Mission Hills Bank and no one promised her employment for any particular period of time at the Bank.

II. Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252.

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). Once the

moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. *Applied Genetics*, 912 F.2d at 1241.

"[W]e must view the record in the light most favorable to the parties opposing the motion for summary judgment." *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. *Anderson*, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). Where the nonmoving party fails to properly respond to the motion for summary judgment, the facts as set forth by the moving party are deemed admitted for purposes of the summary judgment motion. D. Kan. Rule 206(c). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so-one-sided that one party must prevail as a matter of law." *Anderson* at 251-52. Ever mindful of these summary judgment standards, we now turn to the merits of defendant's motion.

A. Plaintiff's Sex Discrimination Claims in Counts I and II

In Plaintiff's amended complaint, she articulates her sex discrimination theory as follows: "[d]efendants discharged Plaintiff Panis on the basis of her marriage to her husband, Sal O. Panis, and the newspaper article concerning his indictment for fraud," and that "[b]y doing so, Defendants discharged Plaintiff Panis on the basis of her sex." *See* Amended Complaint, ¶¶ 43-44. In Count I, plaintiff contends that defendants terminated her employment on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17 ("Title VII"). In Count II, plaintiff advances the same theory under the Kansas Act Against Discrimination, K.S.A. §§ 44-1001 to 44-1014 ("KAAD"). For purposes of this motion, defendants concede that plaintiff's discharge resulted from her husband's indictment for bank fraud and the publicity which ensued from that indictment. Defendant contends, however, that plaintiff's sex discrimination claims must fail as a matter of law.

Title VII makes it unlawful for an employer "to discharge any individual because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The KAAD bars employment discrimination "because of the race, religion, color, sex, disability, national origin or ancestry" of any person. K.S.A. § 44-1009(a)(1). Neither statute prohibits discrimination on the basis of the identity of an individual's spouse, or even mentions "marriage."

First, defendant argues that plaintiff has not offered any "direct evidence" of discrimination to establish a

claim under Title VII or the KAAD. Defendant correctly points out that an employment decision based on the identity or the activities of an employee's spouse does not constitute sex discrimination under Title VII or the KAAD. *See, e.g., Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1508-12 (10th Cir. 1987) (employer rule prohibiting employment of spouses within same department not discriminatory where disparate impact on basis of sex not proven); *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 412 (8th Cir. 1975) (same); *Smith v. Mutual Benefit Life Ins. Co.*, 13 Fair Empl. Prac. Cas. (BNA) 252, 253 (D.N.J. 1976) (policy denying employee ability to transfer to position under supervision of his wife was "neither discriminatory per se nor in its application"). Before a marriage-based sex discrimination claim can be upheld, some dissimilarity in treatment *between the sexes* must be shown. *See Mabry v. State Board of Community Colleges & Occupational Education*, 813 F.2d 311, 315 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987). *Cf. Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) (rule prohibiting employment of married stewardesses discriminatory because steward marriage was not prohibited), *cert. denied*, 404 U.S. 991 (1971).

Plaintiff has failed to present any direct evidence of discrimination. It is undisputed that plaintiff's termination was based on the illegal actions of her spouse, and the Bank's customer confidence concerns arising out of the publicity surrounding her spouse's indictment for embezzlement, and not merely on the fact that she was married. But for her husband's illegal actions, the fact that plaintiff was married to him would not have affected

her employment at Mission Hills Bank. Indeed, as defendant observes, even if Title VII or the KAAD proscribed discrimination based on marital status – which they do not – summary judgment against plaintiff's claims would be appropriate on these facts. "That *who* you are married to rather than *if* you are married is a significant distinction in evaluating discrimination because of marital status is well supported by respectable case law." *Klanseck v. Prudential Ins. Co. of America*, 509 F. Supp. 13, 18 (E.D. Mich. 1980) (rejecting claim under state anti-marital discrimination statute) (emphasis in original). Accordingly, plaintiff's sex discrimination theory – that by terminating "plaintiff Panis on the basis of her marriage to her husband, Sal O. Panis, and the newspaper article concerning his indictment for fraud . . . , Defendants discharged Plaintiff Panis on the basis of her sex" – is unsupported by law.

Second, defendant contends that plaintiff's sex discrimination claims also fail as a matter of law under the burden allocation scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined in *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981). This court recently articulated the "three-step analysis" established by *McDonnell Douglas* and *Burdine*:

> First, a plaintiff must establish a prima facie case. Second, once a plaintiff establishes a prima facie case, the burden shifts to the defendant to 'articulate a legitimate, nondiscriminatory reason for its action.' Third, if the defendant articulates a legitimate, nondiscriminatory reason, then the burden shifts back to the plaintiff; the plaintiff must then show that the reason proffered by the defendant is merely a pretext

> designed to conceal an illegal discriminatory motive.

Roberts v. Associated Wholesale Grocers Inc., 1993 WL 390378, *8 (D. Kan. 1993) (quoting *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 977 (10th Cir. 1991) (citations omitted).[1]

Assuming *arguendo* that plaintiff is able to satisfy the first step of the analysis by establishing a prima facie case, defendants must articulate a "legitimate, non-discriminatory reason for [their] action." *Id.* Defendants' articulated reason for action may be a "good" reason or a "bad" reason, but so long as plaintiff was not discharged for a *discriminatory* reason, defendants have satisfied their burden of production. *See EEOC v. Flasher Co.*, 986 F.2d 1312, 1319 (10th Cir. 1992). Moreover, the reason given must be clear and reasonably specific, although the defendant need not convince the court it actually was motivated by that reason." *Roberts*, 1993 WL 390378, *8. *See also St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 2749 (1993).

Here, defendants have articulated a legitimate non-discriminatory reason for their decision to terminate plaintiff. Defendants contend plaintiff was discharged because she was married to an individual, formerly an

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[1] This analysis also applies to employment discrimination claims under the KAAD. *See Reber v. Mel Falley, Inc.*, 235 Kan. 562, 683 P.2d 1229, 1232 (1984) ("we also accept and embrace the rules stated in *Burdine* as to the burden of proof, prima facie case and burden of going forward in [KAAD] discrimination cases"); *Woods v. Midwest Conveyor Co.*, 231 Kan. 763, 648 P.2d 234, 239 (1982) (same).

officer at UMB, who had been indicted for defrauding an elderly depositor of UMB of at least $77,000.00. The Bank's board of directors determined that the publicity surrounding this misconduct could compromise depositor and customer confidence in the Bank if the Bank were to continue to employ plaintiff. Defendants' proffered reason is indisputably "legitimate and nondiscriminatory."

Because defendants have articulated a legitimate, nondiscriminatory reason for the discharge, plaintiff may avoid summary judgment only if she can come forward with evidence demonstrating that the proffered reason is merely a pretext *for intentional discrimination* based on sex. *St. Mary's Honor Center v. Hicks,* 113 S. Ct. at 2751-52; *Roberts,* 1993 WL 390378, *8 (D. Kan. 1993) (quoting *Burdine,* 450 U.S. at 253). To establish a " 'genuine issue' of pretext sufficient to necessitate a trial [a plaintiff must produce] specific facts: (1) showing that the employer's "explanation is unworthy of credence"; or (2) demonstrating 'directly' that 'a discriminatory reason actually motivated' the employer." *Roberts,* 1993 WL 390378, *9 (quoting *Carey v. United States Postal Serv.,* 812 F.2d 621, 626 (10th Cir. 1987).

Here, the record is devoid of any such specific facts that would support an assertion of pretext. Even plaintiff admits that she was "discharged . . . on the basis of her marriage to her husband, Sal O. Panis, and the newspaper article concerning his indictment for fraud." *See* Amended Complaint, ¶43. This statement comports entirely with defendants' proffered legitimate, nondiscriminatory reason for discharge. In fact, the evidence

shows that at the Board of Director's meeting on December 18, 1990, a director and defendant herein, Ms. Julie Esrey, placed the issue of discrimination squarely before that body. As defendant director Tom Turner testified in response to a question from plaintiff's counsel:

> Julie Esrey asked the question . . . would we be doing the same thing, would we have the same discussion, were this a male employee with a female – if the situations were reversed, if the roles were reversed. And everybody immediately concluded that the issue of sex wasn't what the object was here, that it was a question of whether or not it had any detrimental impact, publicly, on our clientele, and we concluded that it might, and therefore, in the best interests of the bank, we should do something.

The reason for plaintiff's termination is undisputed, and the only issue before us is whether that reason was discriminatory on the basis of sex. The fact that plaintiff was discharged because of the publicity surrounding her husband's illegal activities does not support a finding that she was terminated on the basis of her sex. Defendants' reason for terminating plaintiff was legitimate and not a pretext for discrimination. Therefore, the claims asserted in Counts I and II of plaintiff's Amended Complaint fail as a matter of law, and summary judgment is entered in defendants' favor on those claims.[2]

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[2] In light of the court's determination, we need not consider defendants' additional argument that Count II also fails as a matter of law on the grounds that it is preempted by Section 24 (Fifth) of the National Bank Act, 12 U.S.C.A. § 24 (Fifth).

B. Subject Matter Jurisdiction over the Plaintiff's Claims Against the Individual Defendants Named in Counts I and II

Independent of the foregoing, defendants assert that the individual defendants named in Counts I and II should be dismissed because they were not individually named as respondents in plaintiff's formal EEOC charge. Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), provides that the aggrieved party may bring a civil action "against the respondent named in the charge" after exhausting administrative remedies. The KAAD has a similar requirement. *See* K.S.A. § 44-1005(a). "Mere omission of a party's name from the EEOC charge does not automatically mandate dismissal for lack of subject matter jurisdiction of a subsequent action under Title VII." *Summerlin v. Morrison*, 1993 WL 33342, *1 (D. Kan. 1993) (quoting *Romero v. Union Pacific Railroad*, 615 F.2d 1303, 1311-12 (10th Cir. 1980)). Instead, the court must evaluate a number of factors before dismissing a party from a Title VII action for not being named in the charge. *Id.* Those factors include:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purposes of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in

> some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id. at *2, (quoting *Romero,* 615 F.2d at 1312).

It is undisputed that in her charge, plaintiff named as respondents "Mission Hills Bank, N.A. and Its Representatives," but did not identify the "representatives" by name or title. It is also undisputed that the individually named defendants were involved in the alleged discrimination, and plaintiff and her counsel had knowledge of that participation prior to the filing of the charge. Additionally, defendant Bank and the individually named defendants are distinct entities such that the naming of the Bank in the charge would not serve as notice to the others. Moreover, the individual defendants have been prejudiced by plaintiff's failure to name them in the charge, as they were not involved in the KCCR's investigation or attempts at conciliation. The court concludes that it lacks subject matter jurisdiction over the individual defendants.

C. Plaintiff's Breach of Implied Employment Contract Claim

Plaintiff's implied-in-fact employment contract theory is based on "her belief that no employee of MHB would be terminated except for cause . . . [which is] supported by objected [sic] evidence." Plaintiff apparently came about this belief by participating in the termination of one of five employees who were terminated during her tenure at the bank. With respect to the one employee, plaintiff alleges that before this employee's

termination, her shortcomings were documented and she was given a chance to correct her problems.

Defendant argues, and Plaintiff concedes, that a *mutual* intent of the parties to be bound by contract is a predicate condition to the formation of an implied-in-fact contract. Plaintiff's Memorandum in Opposition at 30 (citing *Atchison County Farmers Union Coop. Ass'n. v. Turnbull*, 241 Kan. 357, 736 P.2d 917, 922 (Kan. 1987); *Mai v. Youtsey*, 231 Kan. 419, 422, 646 P.2d 475, 479 (Kan. 1982); *see also Hullman v. Board of Trustees of Pratt Comm. Coll.*, 725 F. Supp. 1536, 1550 (D. Kan. 1989), *aff'd*, 950 F.2d 665 (10th Cir. 1991). Moreover, an employee's "unilateral expectation of continued employment" is not sufficient to create an implied-in-fact contract. *Harris v. Board of Public Utilities of Kansas City*, 757 F. Supp. 1185, 1190 (D. Kan. 1991).

Here, the only evidence plaintiff has offered of defendants' intent to contract consists of the defendants' treatment of one other employee who was terminated. This evidence is insufficient as a matter of law. "A key inquiry for finding an implied contract is a pattern or practice of acting in a similar situation. Two similar acts . . . do not rise to the level of a practice." *Enstrom v. Beech Aircraft Corp.*, 712 F. Supp. 841, 852 (D. Kan. 1989) (holding the plaintiff's evidence that plaintiff and another employee had not been terminated for improper conduct in a prior instance did not support the conclusion that an implied-in-fact contract was formed).

Furthermore, the Bank's Associate Handbook, which plaintiff herself participated in drafting, explicitly denies any intent to contract. The cover of that handbook stated:

"EMPLOYMENT WITH THE BANK IS FOR NO DEFINITE TERM AND MAY BE TERMINATED AT ANY TIME, WITH OR WITHOUT NOTICE, FOR ANY REASON." In the section captioned "RESIGNATIONS AND TERMINATIONS," the Associate Handbook provided: "There is no contractual arrangement between the associate and bank regarding employment. All employment is considered at-will and can be terminated at any time by either party without cause." In her deposition, plaintiff admitted that she was never promised a job for any definite term, and she offers no documentary evidence that the Bank ever expressed any intent to enter into a contract of employment with her. In short, plaintiff has not shown that there is a genuine issue of material fact as to whether defendants had the intent to contract with plaintiff. The undisputed facts before the court do not support a claim for implied-in-fact contract, and accordingly, summary judgment is entered in defendants' favor on Count IV.[3]

Plaintiff's attempt to advance a second theory for this claim is likewise unpersuasive. In support of her second basis for relief, plaintiff alleges the following:

> The second basis of the plaintiff's claim of implied contract is defendant [sic] and president of MHB, McElvain on November 28, 1990 specifically agreed to conduct an investigation concerning the customer base of the bank to

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[3] In light of the court's determination, we need not consider defendants' additional argument that Count IV also fails as a matter of law on the grounds that it is preempted by Section 24 (Fifth) of the National Bank Act, 12 U.S.C.A. § 24 (Fifth).

> determine whether or not the publicity surrounding Panis's husbands [sic] indictment would affect MHB business and then they [sic] would in fact conduct such an investigation and then upon obtaining its result call her back to work because she felt MHB would not lose any business. The defendants conducted no investigation prior to December 18, 1990. This breached the implied contract between Panis and MHB.

Plaintiff's Memorandum in Opposition at 30 (citations omitted). Defendant raises serious questions regarding whether this claim is even properly before this court. *See* Defendant's Reply Memorandum in Support of Defendants' Motion for Summary Judgment at 20-22. Defendants' concern need not be entertained, however, as we conclude that even if this claim were properly before the court, it would fail as a matter of law under the foregoing analysis and authorities.

D. Plaintiff's Conversion Claim

In Count III of her complaint, plaintiff claims that defendants Mission Hills Bank, Rupp, Larrabee and McElvain converted a $78.78 merit pay increase from plaintiff's demand deposit account at Mission Hills Bank in late November 1990, after plaintiff was placed on a paid leave of absence. Defendants contend that plaintiff's conversion claim fails as a matter of law.

The court finds that, having granted defendants summary judgment on all of plaintiff's other counts, the court does not have jurisdiction over Count III. We find no federal question, nor is there diversity of citizenship with

the requisite amount in controversy. The court declines to exercise its jurisdiction over this pendant state law claim.

Even if the court were to consider plaintiff's conversion claim, it would fail as a matter of law. First, defendants quite correctly assert that funds credited to a depositor in a bank's demand deposit account cannot be the subject of a conversion action. Conversion is the "unauthorized assumption or exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the other's rights." *Moore v. State Bank of Burden*, 240 Kan. 382, 729 P.2d 1205, 1210 (1986), *cert. denied*, 482 U.S. 906 (1987). However, " 'where there is no obligation to return identical money, but only a relationship of debtor and creditor, an action for conversion of the funds representing the indebtedness will not lie against the debtor." *Temmen v. Kent-Brown Chevrolet Co.*, 227 Kan. 45, 605 P.2d 95, 99 (1980) (quoting 18 Am. Jur. 2d, *Conversion* § 10). Therefore:

> It is well recognized that the relationship between a general depositor and his or her bank is that of creditor and debtor, and money deposited, unless segregated into a special account and designated to be kept separate, becomes the property of the bank. *Chilson v. Capital Bank of Miami*, 237 Kan. 442, 444, 701 P.2d 903 (1985).

Moore, 729 P.3d at 1210. *See also, e.g., Securities Fund Services, Inc. v. American National Bank & Trust Co. of Chicago*, 542 F. Supp. 323, 328 (N.D. Ill. 1982) ("In a general deposit situation, the bank merely becomes the debtor of the depositor to the extent of the deposit, and the title to the money passes to the bank"); *Luxonomy Car, Inc. v. Citibank, N.A.*, 65 App. Div. 2d 549, 408 N.Y.S.2d

951, 954 (1978) ("A checking account, which does no more than create a debtor-creditor relationship, does not satisfy that requirement [*i.e.*, that there be specific and identifiable property] and cannot be converted.")

It is undisputed that plaintiff's bank account, from which she alleges that defendants "converted" $78.78, was a general demand deposit checking account, and not a special account in which property is kept. Plaintiff's claim for conversion is legally untenable.

As an additional basis for granting summary judgment on this claim, defendants urge that the undisputed facts developed through discovery indicate that plaintiff did not have any immediate right of possession to the funds that allegedly were converted. "To maintain an action for conversion, a plaintiff must have actual possession of the property or a right to immediately take possession of the property." *Gillespie v. Seymour,* 14 Kan. App. 2d 563, 796 P.2d 1060, 1066 (1990), *aff'd in part, rev'd in part on other grounds,* 250 Kan. 123, 823 P.2d 782 (1991). Here, plaintiff had neither actual possession of the disputed $78.78 nor a right to take immediate possession of those funds. Plaintiff's conversion claim fails as a matter of law.

For the foregoing stated reasons, plaintiff's Motion for Partial Summary Judgment is denied.

IT IS THEREFORE ORDERED that the Joint Motion of all Defendants for Summary Judgment (Doc. #242) is granted.

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment (Doc. #233) is denied.

IT IS FURTHER ORDERED that all costs in this matter are assessed against plaintiff in favor of the defendants.

Dated this 5th day of April, 1994, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR
United States District Judge

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawfulemployment

practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment

agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

> **(1)** the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and
>
> **(2)** such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a

preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

> **(i)** a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the

basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any

employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws –

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had –

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had

previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to –

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such

judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

(Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub.L. 102-166, Title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1964 Acts. Senate Report No. 872 and House Report No. 914, see 1964 U.S. Code Cong. and Adm. News, p. 2355.

1972 Acts. House Report No. 92-238 and Conference Report No. 92-899, see 1972 U.S. Code Cong. and Adm. News, p. 2137.

1991 Acts. House Report No. 102-40 (Parts I and II), Interpretive Memorandum, and Statement by President, see 1991 U.S. Code Cong. and Adm. News, p. 549.

References in Text

The Subversive Activities Control Act of 1950, referred to in subsec. (f), is Act Sept. 23, 1950, c. 1024, Title I, 64 Stat. 987, which is classified principally to subchapter 1 (section 781 et seq.) of chapter 23 of Title 50, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 781 of Title 50 and Tables.

The Controlled Substances Act, referred to in subsec. (k)(3), is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat.

1242, as amended, which is classified principally to subchapter I (section 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Federal Rules of Civil Procedures, referred to in subsec. (n)(2)(A), are set out in Title 28, Judiciary and Judicial Procedure.

Amendments

1991 Amendments. Subsec. (k), Pub.L. 102-166, § 105(a), added subsec. (k).

Subsec. (*l*). Pub.L. 102-160, § 106, added subsec. (*l*).

Subsec. (m). Pub.L. 102-166, § 107(a), added subsec. (m)

Subsec. (n), Pub.L. 102-166, § 108, added subsec. (n).

1972 Amendments Subsec. (a)(2), Pub.L 92-261, § 8(a), added "or applicants for employment" following "his employees".

Subsec. (c)(2), Pub.L. 92-261, § 8(b), added "or applicants for membership" following "membership".

Effective Dates

1991 Acts. Amendment by Pub.L. 102-166 effective Nov. 21, 1991, except as otherwise provided, see section 402 of Pub.L. 102-166, set out as a note under section 1981 of this title.

For applicability of Pub.L. 102-166 to any disparate impact case for which a complaint was filed before Mar. 1,

1975, and for which an initial decision was rendered after Oct. 30, 1983, see, also, section 402 of Pub.L. 102-166.

1964 Acts. Section effective one year after July 2, 1964, see section 716 of Pub.L. 88-352, set out as a note under section 2000c of this title.

Effect of 1991 Amendment Upon Court-Ordered Remedies, Affirmative Action, and Conciliation Agreements

The amendments made by Title I of Pub.L. 102-166 were not to be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that were in accordance with the law, see section 116 of Pub.L. 102-166, set out as a note under section 1981 of this title.

Severability of Provisions

Invalidation of provision, amendment or application of Pub.L. 102-166 not to affect remaining provisions, amendments and applications, see section 401 of Pub.L. 102-166, set out as a note under section 1981 of this title.

Alternative Means of Dispute Resolution Encouraged

The use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising